Office Supreme Court, U.S.
FILED
FEB 12 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 824

CLARENCE CISIN, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PENROSE LUCAS ALBRIGHT
708 Perpetual Building
Washington, D. C. 20004
Attorney for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
The Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement of the case	3
Reasons for the allowance of the writ	5
Conclusion	11
Appendix A—Statutes	1a
Appendix B—Opinion and judgment below	6a
Appendix C—Conflicting Opinion	6a

CITATIONS

CASES:

Alabama v. United States, 325 U.S. 535	10
American Ship Fitting Corp. v. U.S., 70 C.Cls. 679	7
Cannon v. United States, 137 C.Cls. 104	7
Empire Institute of Tailoring, Inc. v. United States, 142 C.Cls. 165	7
Friedman v. United States, 301 F. 2d 674, *cert. den.*, 373 U.S. 932	8
Levine v. United States, 133 C.Cls. 104	7
Lipp v. United States, 301 F. 2d 674, *cert. den.*, 373 U.S. 932	8
Rice v. United States, 122 U.S. 611	7
Smith Courtney Co. v. United States, 46 C.Cls. 262	6
The Chicago Junction Case, 264 U.S. 258	10
United States v. Alire, 73 U.S. 573	6, 8, 6a
United States v. Wardwell, 172 U.S. 48	7

STATUTES:

The Career Compensation Act of 1949, 63 Stat. 817	
Section 402 (b)	2, 1a
Section 402 (d)	2, 2a
Section 403	2, 2a
10 U.S.C. 1552	2, 2a
28 U.S.C. 1491	2, 5a
28 U.S.C. 2501	2, 5a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

CLARENCE CISIN, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Clarence Cisin, prays that a Writ of Certiorari issue to review the final order of the United States Court of Claims of November 15, 1963, whereby the claim filed by Petitioner was dismissed in that court.

THE OPINION BELOW

The opinion of the United States Court of Claims (R. 49) printed on page 6a of the Appendix to this Petition of November 15, 1963, was unreported.

JURISDICTION

The judgment of the United States Court of Claims was entered on November 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1255.

QUESTIONS PRESENTED

1. Does the Court of Claims have jurisdiction under 28 U.S.C. Section 1491, and accordingly does the six-year statute of limitations for such court under 28 U.S.C. Section 2501 commence to run before the claimant has accrued a claim for money?

2. Does a new claim accrue before the United States Court of Claims based upon an arbitrary and capricious decision of a board for the correction of military records (established by 10 U.S.C. Sec. 1552) wherein the events which would have justified the correction took place more than six years prior to the filing of a petition in the Court of Claims, but the final decision of the correction board was made within six year of such filing?

3. Should the statute of limitations against a claim be invoked by the United States Government wherein it advises such claimants in writing with their application form blanks of the availability of non-lawyer counsel to aid in prosecuting their claims and the claimant has so obtained a non-lawyer to represent him?

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix A annexed hereto, pages 1a-5a. They are: Sections 402(b), 402(d), and 403 of Title IV of the Career Compensation Act of 1949; United States Code, Title 10, Section 1552, and United States Code, Title 28, Sections 1491 and 2501.

STATEMENT OF THE CASE

The jurisdiction of the Court of Claims was invoked under United States Code, Title 28, Section 1491, by the institution of a claim in such court for retired pay as a Commander, United States Naval Reserve. The court dismissed the claim on the ground that it was barred by the statute of limitations. However, the real issue involved is a jurisdictional one—that is, when did the claim of Petitioner first become cognizable by the Court of Claims.

The Petitioner served on active duty in World War I, returned to active duty in World War II, and continued to serve in such status until *separated* for a 20 per cent physical disability with severance pay pursuant to Title IV of the Career Compensation Act of 1949, on June 4, 1954. (R. 2)

If the Petitioner's disability had been rated at 30 per cent instead of 20 per cent, he would have been *retired* for physical disability with retired pay and there is no dispute but that he had at least an additional 10 per cent disability due to an unrated wrist injury at the time he was separated. (R. 19) But there is a dispute as to when the wrist injury took place. The Bureau of Medicine and Surgery of the Navy has persistently indicated that the occurrence was in 1923 while Petitioner was a civilian in view of the statement contained in the Petitioner's medical record to such effect. (R. 9, 10, 19, 20) On the other hand, the Petitioner has disavowed the accuracy of such statement and has alleged the injury was incurred during a period of service during World War I. (R. 2, 3)

But irrespective of the time of the occurrence of the disabil[illegible] (as long as it was before the Petitioner

entered his service during the Second World War), the Navy did not rate such disabilities when the Petitioner was severed because of an erroneous and subsequently repudiated interpretation of the law by the Office of the Judge Advocate General of the Navy that it could not rate disabilities incurred in a prior period of service. (R. 3, 4, 6)

In 1955, the Petitioner filed an application with the Board for the Correction of Naval Records and to such Board, over a period of time, submitted evidence showing the occurrence of his wrist disability during active duty during World War I by a nurse who had then witnessed it, evidence that such disability was aggravated during World War II, a statement from the President of the Physical Evaluation Board which acted on the case that such Board would have rated the Petitioner's wrist disability at 10 per cent except for the subsequently repudiated opinion of the Judge Advocate General, a photograph taken in 1921 showing Petitioner wearing a wrist band on the affected wrist, and evidence that the Petitioner was suffering from cancer of the skin in places where he was noted to have seborrheic keratoses and angiomas while on active duty. (R. 7-10, 14-27)

Despite this formidable array of evidence, the Board for Correction of Naval Records consistently refused to correct the Petitioner's record to show that he was retired instead of separated by reason of physical disability. It is manifest that the basis for the action by the Board was written opinions on the case by the Chief, Bureau of Medicine and Surgery. (R. 10)

The Board for Correction of Naval Records specifically announces the availability of non-lawyer repre-

sentation by Service Organizations such as the American Legion, DAV, VFW, etc. in cases before it and Petitioner was so represented, at least until an adverse decision by such Board in August of 1960. (R. 6, 7)

The Petition in this case was filed before the Court of Claims July 12, 1962. (R. 1) This was eight years after his separation. But until approximately January 1, 1957, the Petitioner had no *money claim* at the Court of Claims, since the disability severance pay which he had previously received exceeded his accrued entitlement to disability retirement pay until such date. (R. 11)

This is to say, if the Court of Claims had jurisdiction and the case had been brought and decided before January 1, 1957, the Petitioner would have collected no money at that time from the Government pursuant to his claim, but rather would have owed the Government money, and if he had died previous to this date, presumably his estate would have been liable for the amounts owed.

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. A Conflict Exists Between the Decision as to Which Review Is Sought and a Prior Decision Rendered By This Court

The statute concerning the time for filing suit in the United States Court of Claims, 28 U.S.C. 2501, provides that "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

This Court had occasion to consider what comprises claims over which the Court of Claims has jurisdiction

in the case of *United States* v. *Alire*, 1868, 73 U.S. [6 Wall.] 573, [App. C]. In such case, this Court stated on pages 575 and 576:

> It will be seen by reference to the two Acts of Congress on this subject, that the only judgments which the Court of Claims are authorized to render against the government, or over which the Supreme Court have any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is made, *are judgments for money* found due from the government to the petitioner. And, although it is true that the subject matter over which jurisdiction is conferred, both in the act of 1855, and of 1863, would admit of a more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up *a moneyed demand as due from the government*. [Emphasis added]

Under United States Code, Title 28, Sec. 1491, the jurisdiction of the Court of Claims is essentially the same as it was at the time of *United States* v. *Alire*; that is, "to render judgment upon any claim against the United States".

The Court of Claims has previously adhered to this rule. Accordingly, we have the following from opinions:

> It has been determined by the Supreme Court and this court, and is in fact elementary, that a right of action accrues and the statute of limitations begins to run when and only when, the period of credit has expired; or, in other words, when an account is due and payable, or when there is a breach of contract. *Smith Courtney Co.* v. *U.S.*, 1944, 46 C. Cls. 262, 265, 266.

> The statute of limitations which is jurisdictional in this court—*United States* v. *Wardwell*, 172 U.S. 48, 52—begins to run when a suit may first be brought under our jurisdictional act. *Rice* v. *United States*, 122 U.S. 611, 617. *American Ship Fitting Corp.* v. *U. S.*, 1930, 70 C. Cls. 679, 688, 689.
>
> Pursuant to 28 U.S.C. Sec. 2501, an action in the Court of Claims must be brought within six years of the date of its accural. Within the meaning of that section an action first accrues on the date when all events have occurred which fixed the liability, if any, of the United States and upon which date a potential claimant becomes entitled to sue thereon. *Levine* v. *U.S.*, 1956, 133 C. Cls. 774, 779, 780.
>
> A course of action of whatever nature can accrue only at the time that a suit may be maintained thereon, and from that date forward the applicable statute of limitations begins to run. *Cannon* v. *U.S.*, 1956, 137 C. Cls. 104, 107.
>
> This court has consistently held that a claim first accrued on the date when all events have occurred which fix the liability, if any, of the United States and entitles the claimant to sue thereon. *Empire Institute of Tailoring, Inc.* v. *United States*, 1958, 142 C. Cls. 165, 167.

It is important to note that in the instant case, the question of whether Petitioner would receive severance pay or disability retirement pay depended upon his percentage of disability. If it were less than 30 per cent, he receives severance pay, but if it were 30 per cent or more he receives retirement pay. Title IV of the Career Compensation Act of 1949 authorizes these benefits in the alternative and *in no event could Petitioner receive both.*

For the Petitioner to have a money claim against the United States, he had to do at least one thing. That was to live until January 1, 1957. Until then, he had no claim cognizable by the Court of Claims.

It is submitted that the Court of Claims has broadened its jurisdiction beyond that granted by statute and as set forth in *U. S.* v. *Alire*.

The Court of Claims has, in effect, held that a claimant in the position of the Petitioner is entitled to sue even though he does not have a claim for money at the time he brings suit.[1] Alternatively, it has eliminated the right to sue as requisite to commence the running of the statute of limitations.

It is urged that this is more than a conflict in the application of the rules of law, but rather is a conflict in principle both with the statutory jurisdiction of the Court of Claims and the prior holding by this Court in *U. S.* v. *Alire*.

2. The Court of Claims Is Arbitrary in Refusing to Accept Jurisdiction in a Claim Against the United States Founded Upon the Arbitrary and Capricious Action of the Board for the Correction of Naval Records

In the decisions of *Frank E. Lipp* v. *The United States*, Ct. Cls. No. 384-58, decided April 4, 1962; 301 F. 2d 674, *cert. den.*, 373 U.S. 932 and *Betty Friedman, Executrix of the Estate of Joseph Friedman, deceased*,

[1] Because the Petitioner served in World War I and accordingly is entitled to receive a full 75 per cent retired pay, his money claim first accrued within the six years following his separation. However, had he been entitled to be placed upon the permanent retired list with only 30 per cent retired pay, he would not have had a claim for money until six and two-thirds years from his separation.

v. *The United States*, C. Cls. No. 377-60, decided Nov. 7, 1962, 310 F. 2d 381; *cert. den.*, 373 U.S. 932, the Court of Claims has taken the position that since the correction board actions are not a prerequisite for its jurisdiction—not being administrative remedies which must first be exhausted—action before a correction board does not toll the statute of limitations under 28 U. S. Code, Sec. 2501. Accordingly, where a claim would otherwise be barred by the statute of limitations, the Court of Claims will not entertain jurisdiction to determine whether the Correction Board action is arbitrary and capricious.

It is submitted that this is an erroneous interpretation, since a new cause of action must necessarily arise when the Correction Board has been arbitrary and capricious under United States Code, Title 10, Sec. 1552. In the instant case, although a hearing is provided for in the regulations, it is obvious that the Board for Correction of Naval Records, which by the legislation must be composed of "civilians", abrogated its functions to the Chief, Bureau of Medicine and Surgery, a uniformed naval officer, even though it was shown that the basis for such officer's opinion was error beyond peradventure.[2]

This action by the Court of Claims is in conflict with the holdings of this Court to the effect that an administrative order which is based upon a finding not supported by substantial evidence must be set aside

[2] The basis for the opinion of the Chief, Bureau of Medicine and Surgery, was a *medical entry* to the effect that the petitioner injured his wrist in 1923. In rebuttal, an eye witness was found who helped treat petitioner's injury during World War I, and a photograph taken in 1921 was produced showing that the petitioner was wearing a wrist band at the time.

as arbitrary. *The Chicago Junction case*, 1924, 264 U.S. 258, 265; *Alabama* v. *United States*, 1945, 325 U.S. 535. To hold that an action by a statutory board is not reviewable because it involves events which preceded the actions of the board is indeed a novel holding which unnecessarily limits the jurisdiction of the Court of Claims and should be extinguished by this Court.

3. The Peculiar Construction Given to the Statute of Limitations by the United States Court of Claims Is Particularly Odious in That the Correction Boards Actually Advise Applicants Before Them on the Back of the Application Forms of the Availability of Non-Lawyer Counsel to Aid Them in Prosecuting Their Claims

In this case, the Petitioner was originally represented by a representative from the Veterans of Foreign Wars who has not a lawyer. Such representation is afforded as a benefit the Veterans of Foreign Wars organization holds out to various claimants, and the availability of such an organization to represent applicants is set forth on the back of the instruction sheet given to applicants for the preparation of their applications. However, such representation is usually non-lawyer representation and was so in this case.

The VFW representative in this case made requests for consideration by The Board for Correction of Naval Records for the submission of additional evidence, and protested the referral of the case to the Chief, Bureau of Medicine and Surgery until March 31, 1960. At that date, even under the construction given by the Court of Claims to the statute of limitations, an action could have been seasonably filed on behalf of the Petitioner. However, the request for

reconsideration was denied on August 29, 1960, which is more than six years after the Petitioner had been separated. Throughout this period, the Petitioner was without the representation of an attorney who was a member of the bar.

Certainly, denial of the assistance of qualified counsel in an administrative proceeding is a denial of due process. Can, then, this be avoided by merely "recommending" non-lawyer representation?

It is earnestly solicited that the circumstances point to an effective denial of administrative due process by not only the procedures employed before the Correction Board, but also by the encouragement to the applicant to seek and utilize non-lawyer assistance. If the statute of limitations has run it is to be seen that the hands of the Respondent are not entirely clean and it is submitted that the Respondent should not be permitted to invoke the statute of limitations under such circumstances.

CONCLUSION

It is urged that the holding of the Court of Claims in this case necessarily enlarges its jurisdiction in finding that a right to sue the United States is considered to exist at a time when there was in fact no monetary claim, and, on the other hand, the holding has unduly restricted its jurisdiction by refusing to recognize a claim under an act of Congress which was properly raised by the Petition—under circumstances where at the administrative level due process was denied to the Petitioner. Not only have the Petitioner's rights been seriously breached by the Government and the decision of the Court of Claims, but in doing so the Court of

Claims has been in direct conflict with a prior decision of this Court. Accordingly, for the reasons stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PENROSE LUCAS ALBRIGHT
708 Perpetual Building
Washington, D. C. 20004
Counsel for Petitioner